

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 18

Case No. 08-RC-126400

Petitioner; and

PRUSA CONSTRUCTION LLC

Employer.

**INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18'S
EXCEPTIONS AND BRIEF IN SUPPORT TO THE REGIONAL DIRECTOR'S
REPORT ON OBJECTIONS**

Pursuant to Sec. 102.69 of the Board's Rules and Regulations, now comes the International Union of Operating Engineers, Local 18 ("Local 18" or "Union"), by and through counsel, and hereby files its Exceptions and Brief in Support to the Regional Director's Report on Objections in the present matter.

Respectfully Submitted,

/s/ Timothy R. Fadel

Timothy R. Fadel

Wuliger, Fadel & Beyer, LLC

1340 Sumner Court

Cleveland, Ohio 44115

*Counsel for the International Union of
Operating Engineers, Local 18*

EXCEPTIONS

Local 18 excepts to the following findings of fact and law rendered by the Regional Director of Region 8 in its Report on Objections issued in the present matter on June 19, 2014:

1.) The Regional Director recommending that Local 18's objections be overruled and that a Certification of Results be issued;

2.) The Regional Director finding that Employer's misconduct must have occurred during the critical period in order for it to be considered objectionable; and

3.) The Regional Director concluding that Local 18's objections are without merit because there was no credible evidence to show that the Employer's misconduct occurred during the critical period.

BRIEF IN SUPPORT

I. Introduction

On May 23, 2014, pursuant to a Stipulated Election Agreement between Local 18 and Prusa Construction LLC ("Prusa" or "Employer"), a secret ballot election was held at the Employer's place of business to determine if a majority of the eligible voting employees wished to be represented for the purposes of collective bargaining by Local 18. The Union narrowly lost the election. On May 30, 2014, Local 18 timely filed its objections to the election, and further timely submitted evidence in support of its objections on June 4, 2014. On June 19, 2014, the Regional Director rendered its Report on Objections, in which it found that Local 18's objections were without merit, and therefore they should be overruled and that a Certification of Results be issued.

The Regional Director determined that Local 18's objections lacked merit because it found that the Employer's conduct forming the basis of its objectionable conduct occurred before

the “critical period” between the filing of Local 18’s Certification Petition on April 11, 2014, and the election on May 23, 2014. The Regional Director relied upon the Board decision *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961) and its progeny, which require a showing of conduct between the filing of the petition and the election in order for it to be considered objectionable. However, the Regional Director’s formalistic application of the *Ideal Electric* rule fails to take into consideration the Board’s repeated departures from *Ideal Electric* when the circumstances so require. That is, starting with, and subsequent to its decision in *Gibson’s Discount Center*, 214 NLRB 221 (1974), the Board has consistently and repeatedly acknowledged that concluding there are no grounds to set aside an election due to prepetition conduct is a default rule. The underlying concern for the Board is whether the *effect* of prepetition conduct can linger throughout the critical period up until the election. Based on the relevant facts and Board precedent, there is no question that the Employer’s conduct – even if it occurred prior to April 11, 2014 – is objectionable because the effects of its statement to Prusa employees threatening to close down the business if they voted for Union representation lingered throughout the critical period up until the May 23 election.

II. Law and Analysis

The Board has repeatedly departed from the *Ideal Electric* decision – in which prepetition conduct is not usually grounds for setting aside an election – where “it has found clearly proscribed activity likely to have a significant impact on the election.” *E.g.*, *Royal Packaging Corp.*, 284 NLRB 317, 317 (1987). Such a finding of coercive conduct relies upon the fact “that employees could reasonably believe that [the supervisor or employer] was in a position” to implement a threat or promise. *Id.* at 318, fn. 6. This reasonable belief is case-specific, but is

often based upon the nature of the ongoing relationship between the Employer and Union during the prepetition period. *Lyon's Restaurants*, 234 NLRB 178, 179 (1978).

The Board has recognized a wide swath of conduct that may be considered objectionable during the prepetition period. *See, e.g., Connecticut Humane Society*, 358 NLRB No. 31, *37 (2012), fn. 45. The Board first acknowledged this exception to the *Ideal Electric* rule in *Gibson's Discount Center*, 214 NLRB 221 (1974). There, the Board found that union prepetition offers to waive initiation fees were objectionable because they could create a lasting impression upon the employees throughout the critical period which would have the potential to impact the election. *Id.* at 222. Subsequently, in *Servomotion of Columbus, Inc.*, the Board held that “if threats . . . generate[] an atmosphere of fear and coercion which persists to the date of the election and taints the conditions under which it is conducted, the election will be set aside regardless of the time when the misconduct occurred, the end to which it was directed, or the persons responsible for its perpetration.” 219 NLRB 504, 506 (1975). The Board clarified this position in *Lyon's Restaurants*, where it held that a prepetition statement to employees threatening them with loss of work if they did not join the union caused employees to reasonably believe the union had power to affect their employment opportunities throughout the critical period. 234 NLRB at 179. Then in *Harborside Healthcare, Inc.*, the Board found that prepetition solicitation of authorization cards by pro-union supervisory personnel was objectionable conduct, *Ideal Electric* notwithstanding. 343 NLRB 906, 912 (2004). As the Board eloquently stated:

“We recognize that the solicitation of cards in this case occurred largely, if not wholly, prior to the filing of the petition, i.e., outside the critical period. However, in our view, this does not necessarily mean that the conduct is not cognizable as an objection because the impact of the supervisor’s solicitation would ordinarily continue to be felt during the critical period. This is so because of the power of the supervisor over an employee. We think that the solicited employee would be very reluctant to ask a supervisor for the return of a signed card, should the employee change his mind about the wisdom of having signed it.” *Id.*

That the coercive conduct may have ceased prior to the filing of the petition is immaterial because of the conduct's lingering effects throughout the critical period. *Madison Square Garden, LLC*, 350 NLRB 117, 121 (2007). Indeed, the passage of two to three months between the coercive conduct and election “does not render coerced employees suddenly noncoerced.” *Id.* at 122. *Accord SNE Enterprises, Inc.*, 348 NLRB 1041, 1043 (2006). Especially where the employer engaging in coercive conduct during the prepetition period fails to provide “any clear assurance [that the threat will not be executed], following the first [prepetition] threat . . . which had caused such widespread employee apprehension,” such failure “could reasonably have had” the effect of exacerbating such apprehension, rendering its prepetition conduct objectionable. *Yuma Coca-Cola Bottling Co.*, 339 NLRB 67, 68 (2003) (prepetition employer conduct threatening to remove retirement benefits if employees voted for union representation constituted objectionable conduct in light of employer's subsequent failure to ensure threat would not be executed).

There is no question that employer threats made before the critical period to shut down the business if employees vote for union representation squarely fall into that genre of prepetition conduct that the Board has found objectionable because of its lingering effects upon employees. In the context of both election objections and unfair labor practice charges, the Board has repeatedly held that “Employer threats to employees to go out of business in the event they join a union and seek to bargain collectively, are particularly noxious and pernicious.” *E.g., Motz Poultry Co.*, 244 NLRB 573, 576 (1979). Especially where there is a small bargaining unit size, an employer's threat to close the business has the most prolonged effect of any such conduct, as it dissipates a union's prior showing of support and “will continue to dampen the enthusiasm for union activity[.]” *Id.* at 577. (Internal citation omitted.) *Accord NLRB v. Gissel Packing Co.*, 395

U.S. 575, 611, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), fn. 31. Under these circumstances, employer threats to close down “could hardly [be] more coercive.” *Aqua Cool*, 332 NLRB 95, 95 (2000).

Local 18’s evidence supporting its objections substantially demonstrate that Prusa had engaged in this most harmful kind of objectionable conduct.¹ Specifically, Jeff Rundell, Prusa’s operations manager, and top Prusa official, informed *all* of Prusa’s employees on March 19, 2014 that it would fire them and shut down the business if they voted for Local 18 representation. (Camino Aff., ¶¶ 11-12.) Per the Eligibility List provided by the Regional Director, all of Prusa’s approximately 20 employees, other than a few statutory supervisors, were included in the putative bargaining unit. Three specific Prusa employees – Kevin Andrejcak, Andrew Barbish, and Andrew Stricko – informed Local 18 of this meeting. (Camino Aff., ¶ 11.) That Local 18’s evidence supporting its objections consisted of an affidavit by a Local 18 official who received the information of these threats directly from Messrs. Andrejcak, Barbish, and Stricko is not fatal to its sufficiency. The Union’s allegations carry extremely serious implications of wrongdoing. As such, even where there is no direct evidence of an employer relating a threat to close amongst multiple employees, especially where the bargaining unit is small in size and there is active union campaigning, such an evidentiary circumstance “is irrelevant to a finding that” the employer “engaged in objectionable conduct[.]” *Aqua Cool*, 332 NLRB at 106.

Thus, it is unsurprising that the Board has held, *sub silentio*, that even where an employer’s threat to close its business without providing any objective basis for doing so occurred almost entirely during the prepetition period, the harmful effect of such behavior is

¹ Local 18’s evidence comprised the affidavit of Christopher Camino, an Organizer and Business Representative for Local 18. A copy of the affidavit electronically filed with Region 8 is enclosed hereto as “Attachment A.”

enough to constitute objectionable conduct. *Contempora Fabrics, Inc.*, 344 NLRB 851, 863-864, 868 (2005). Prusa was well-aware that Local 18 had been engaging in organizational activities throughout January, February and March of 2014. (Camino Aff., ¶¶ 4-10.) A top Prusa official told all Prusa employees a mere two weeks before Local 18 filed its Certification Petition that the Employer would shutter its doors if Local 18 represented them. (Camino Aff., ¶¶ 11-12.) This is the “most flagrant form of interference” most likely “to destroy election conditions for a longer period of time . . . because they tend to reinforce employees’ fears that they will lose employment if union activity persists.” *Contempora Fabrics, Inc.*, 344 NLRB at 868. While the Employer threatened to close its business a few weeks prior to the filing of the Certification Petition, its chilling effect upon Prusa employees lasted throughout the critical period and up through the election, which Local 18 narrowly lost. Further, Prusa never clarified or redacted its threat to shut down the business in the event of Union representation, ensuring that such a chilling effect remained potent throughout that critical period. *See Yuma Coca-Cola Bottling Co.*, 339 NLRB at 68. That approximately two months elapsed between the March 19 threat and the May 23 election is immaterial. *See Madison Square Garden, LLC*, 350 NLRB at 121. Ultimately, the Employer’s conduct in the present matter has resulted in the same lingering effects that severe misconduct by way of supervisory authorization card solicitations, threats of loss of work, and threats of benefit removals the Board has found sufficient to warrant setting aside the election in *Gibson’s Discount Center* and its progeny.

III. Conclusion

For all the foregoing reasons, Local 18 takes exception to the Regional Director’s conclusion that because the Employer’s misconduct did not occur during the critical period between April 11, 2014 and May 23, 2014, Local 18’s objections lack merit and should be

overruled. Therefore, Local 18 requests that the Board reverse the Regional Director's Conclusion and Recommendations, and order that the Regional Director issue an Order Directing a Hearing on the Objections.

Respectfully Submitted,

/s/ Timothy R. Fadel

Timothy R. Fadel

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1340 Sumner Court

Cleveland, Ohio 44115

*Counsel for the International Union of
Operating Engineers, Local 18*

CERTIFICATE OF SERVICE

A copy of the foregoing was electronically filed with National Labor Relations Board and served *via* email to the following on this 2nd day of July, 2014:

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Allen Binstock (*via* regular mail, postage pre-paid only)
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Region 8
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/s/ Timothy R. Fadel
TIMOTHY R. FADEL, ESQ. (0077531)

ATTACHMENT A

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June 4, 2014

Allen Binstock, Regional Director
National Labor Relations Board
Region 8
1240 E. 9th St., Suite 1695
Cleveland, OH 44199

Via Electronic Filing
with the National Labor Relations Board

Re: Prusa Construction LLC
Case No. 08-RC-126400

Dear Mr. Binstock:

In regards to the above-referenced matter, enclosed please find the affidavit of Christopher Camino in support of its objections e-filed on May 30, 2014.

Please note that Objection #1 contains a slight clerical error in which "Friday 21, 2014" was written instead of "February 21, 2014." Paragraph 8 of the enclosed affidavit states the correct date. Pursuant to our office's June 4, 2014 telephone correspondence with Board Agent Gina Fraternali, this correction, by way of cover letter and supporting affidavit, shall sufficiently resolve any confusion or deficiencies regarding Objection #1.

Sincerely yours,

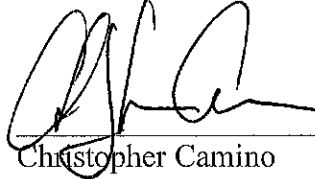

Timothy R. Fadel

TRF: kks
Enclosure

7. Throughout January and February of 2014, I continued to speak with Prusa employees at various jobsites throughout Northeast Ohio in which they were performing work, for the purpose of organizing them as individuals, in which a substantial number desire to be represented for purposes of collective bargaining by Local 18.
8. On or about February 21, 2014, I spoke with Prusa employees at a jobsite in Cleveland, Ohio, for my continued purpose of organizing them. A number of employees refused to sign Union representation cards because they were threatened by Prusa.
9. The Prusa employees at the Cleveland, Ohio jobsite stated to me that Prusa, by and through its agents and/or representatives, threatened them by claiming their identities would be revealed to Prusa's owner, Greg Prusa, if they signed Union representation cards.
10. Throughout March and April of 2014, I continued to speak with Prusa employees at various jobsites throughout Northeast Ohio in which they were performing work, for the purpose of organizing them as individuals, in which a substantial number desire to be represented for purposes of collective bargaining by Local 18.
11. On or about March 19, 2014, I spoke with Prusa employees Kevin Andrejcak, Andrew Barbish, and Andrew Stricko who notified me that they, as well as all other Prusa employees, attended a staff meeting on or about the morning of March 19, in which Prusa's operations manager, Jeff Rundell, discussed Local 18's organizing efforts at Prusa with the employees.
12. Messrs. Andrejcak, Barbish, and Stricko further informed me that during the March 19 staff meeting, Prusa, by and through Jeff Rundell, the operations manager, threatened all

of Prusa's employees by claiming, per the directive of Greg Prusa, it would terminate them and close down its business if the employees voted for Union representation.

FURTHER, AFFIANT SAYETH NAUGHT.



Christopher Camino

6-4-14

DATE

Sworn to and subscribed before me this 4th day of June, 2014.



Notary Public
My Commission expires:

KIMBERLY K STEWART
Notary Public, State of Ohio
Recorded in Cuyahoga County
My Comm. exp. Sept. 18, 2017



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Office: Region 08, Cleveland, Ohio

Case Information

Case Number: 08-RC-126400

Case Name: PRUSA CONSTRUCTION LLC

Role: Petitioner

Contact Information

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Attached E-File(s)

Documentary Evidence
Prusa Constr. LLC, 08-RC-126400 - Local 18's supporting evidence to objections.pdf


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Investigate Charges
Facilitate
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